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No. 88-1559

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In the Supreme Court of the United States

OCTOBER TERM, 1988

GLENPOOL UTILITY SERVICES AUTHORITY, PETITIONER

v.

CREEK COUNTY RURAL WATER DISTRICT NO. 2, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Oklahoma state law prohibits a water service provider, which had borrowed funds from the Farmers Home Administration, from exercising the exclusive distribution right guaranteed to debtors under Section 306(b) of the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1926(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A13-A25) is reported at 861 F.2d 1211. The opinion of the district court (Pet. App. A1-A12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A petition for rehearing was denied on December 23, 1988 (Pet. App. A26-A27). The petition for a writ of certiorari was filed on March 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1964, the Board of County Commissioners of Creek County, Oklahoma, incorporated respondent Creek

County Rural Water District No. 2 (District No. 2) to provide water service within a specified rural area in Creek and Tulsa Counties in northeastern Oklahoma. Under its charter, District No. 2 must provide water service, upon request, to any area within its territory. Pet. App. A3-A6. Under Oklahoma law, such rural water districts have the power

> [t]o borrow money * * * and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require * * *.

Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989).[1] With this authority, District No. 2 obtained a $920,000 loan from respondent Farmers Home Administration (FmHA) in 1965 for the purpose of constructing the water system. As security for the loan, the FmHA received a mortgage covering rights, facilities, and real property owned by District No. 2. That loan is still outstanding. Pet. App. A4-A5, A16.[2]

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[1] This provision, enacted in 1972, retains the identical language of the prior state law authorizing creation of rural water districts. See Okla. Stat. tit. 82, § 1309(4) (1970) (repealed 1972).

[2] Under the Consolidated Farmers Home Administration Act of 1961 (Act), Congress sought to protect water service providers in debt to the FmHA by forbidding competition with those providers during the term of the outstanding federal loans. Section 306(b) of the Act, 7 U.S.C. 1926(b), therefore states that

> [t]he service provided or made available through any such [water service provider] shall not be curtailed or limited by inclusion of the area served by such [provider] within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such

In March 1967, District No. 2 annexed additional territory, including an area that became the residential subdivision known as "Eden South." In January 1983, the City of Glenpool also annexed territory that included Eden South. Eden South's owner knew that District No. 2 claimed an exclusive right to service the area; in fact, District No. 2's water lines were across the street from Eden South. Eden South's owner nevertheless laid water lines from his property to connect with the water service provided by petitioner, Glenpool Utility Services Authority, a public utility trust operated for the benefit of the City of Glenpool. Pet. App. A3-A5.

2. In February 1984, petitioner filed an action against District No. 2 and the owner of Eden South in Oklahoma state court seeking a declaratory judgment that petitioner had the exclusive right to provide water service to Eden South. District No. 2 filed a counterclaim seeking a declaratory judgment that it had that right and an injunction preventing petitioner from providing water service to Eden South. District No. 2 also filed a third-party petition against the FmHA as a necessary party. As a result, the FmHA successfully removed the case to the United States District Court for the Northern District of Oklahoma. Pet. App. A16-A17.

3. After a bench trial, the district court concluded that neither petitioner nor District No. 2 had the exclusive right to provide water service to Eden South, and that District No. 2 was therefore not entitled to an injunction barring petitioner from providing such service (Pet. App. A1-A12).

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area during the term of such loan; nor shall the happening of any such event be the basis of requiring such [provider] to secure any franchise, license, or permit as a condition to continuing to serve the area served by the [provider] at the time of the occurrence of such event.

Although petitioner had been providing water to Eden South, the court found that District No. 2 "could and would provide water service to Eden South within a reasonable time following application [for service]" (*id.* at A6). The court, however, rejected District No. 2's claim to an exclusive right to provide service under Section 306(b) of the Consolidated Farmers Home Administration Act of 1961 (Act), 7 U.S.C. 1926(b) (see note 2, *supra*). In its view, Article 5, Section 51, of the Oklahoma Constitution[3] expressly forbade the creation and operation of such exclusive rights in the state. Pet. App. A9-A10.[4]

Both District No. 2 and the FmHA appealed from the district court's judgment denying declaratory and injunctive relief. Pet. App. A17.

4. The court of appeals reversed, concluding that District No. 2 has the exclusive right to provide water service to Eden South during the term of its indebtedness to the FmHA under Section 306(b) of the Act, 7 U.S.C. 1926(b) (Pet. App. A13-A25). Under the plain terms of the statute, "Congress protected the indebted rural association from curtailment or limitation by impinging municipal corporations" (*id.* at A19). The court of appeals thus agreed with the Fifth Circuit's decision in *City of Madison*

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[3] Okla. Const. art. 5, § 51, provides:

> The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

[4] In addition, the district court concluded that another provision of the state constitution, Article 18, Section 5(a), forbidding municipal corporations from granting any franchises without a referendum, also barred both petitioner's and District No. 2's claims to the exclusive right to service Eden South. Pet. App. A9-A10. The court of appeals did not address this alternative state law ground in reversing the district court's judgment, and petitioner does not present the issue for further review in this Court.

v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (1987), that the statute shows "a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means" (Pet. App. A19 (internal quotation marks and citation omitted)). Since Congress plainly had the authority to provide such an exclusive right under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and state law enabled District No. 2 to borrow money from the FmHA, see Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989), the court of appeals held that District No. 2 alone is entitled to provide water service to Eden South. Pet. App. A20-A23.

The court of appeals rejected petitioner's claim that Article 5, Section 51, of the Oklahoma Constitution prohibits District No. 2 from exercising the exclusive right to provide water service. That state constitutional provision bars only the state legislature from granting exclusive rights. Here, however, federal law, not any state action, confers the exclusive grant. In other words, District No. 2's "right to exclude Glenpool's water service here was granted to the rural water district by the *federal* legislature through section 1926(b), and not by the Oklahoma state legislature. Congress granted District No. 2 the right to be free from municipal intrusion upon its water service during the time of its indebtedness, and Congress can terminate that right at any time" (Pet. App. A23 (emphasis in original)).[5]

[5] In any event, the court of appeals observed that even if the state constitutional provision applied, state law exceptions to that provision appeared to permit District No. 2 to exercise the exclusive federal right to provide water service. Pet. App. A24 n.2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner renews its contention (Pet. 6-7) that the court of appeals erred in concluding that the Oklahoma Constitution permits a state-chartered water service provider to exercise the exclusive grant provided by Section 306(b) of the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. 1926(b). The Court has long made clear, however, that "standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); see *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248, 1253 (1989); *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963). Petitioner offers no substantial basis for departing from this settled practice.[6] For that reason alone, further review is inappropriate.

In any event, the court of appeals correctly concluded that the arrangement between the state water providers and the FmHA is consistent with the Oklahoma Constitution. Section 306(b) of the Act, 7 U.S.C. 1926(b), protects the FmHA's loans to rural water providers by prohibiting encroaching municipalities from taking over or competing with those providers in debt to the FmHA.[7] Congress,

[6] Petitioner asserts that the court of appeals' decision "will have an effect upon all rural water districts" (Pet. 6). Petitioner, however, does not point to a single other state or local jurisdiction that arguably imposes state law barriers to the exclusive grant provision of Section 306(b) of the Act.

[7] A municipality may, however, acquire the facilities owned by a debtor water service provider so long as it follows applicable federal regulations governing the sale. See 7 C.F.R. 1951.209, 1951.214.

through the statute, has given rural water providers a limited, but exclusive, right to provide water service within their territorial limits for the term of their federal loans. Congress's purpose was plain: "to encourage rural water development by expanding the number of potential users of such systems, * * * [and] to safeguard the viability and financial security of such [water] associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison* v. *Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987) (parentheses in original); see *ibid.* (citing S. Rep. No. 566, 87th Cong., 1st Sess. (1961)).

Article 5, Section 51, of the Oklahoma Constitution, on the other hand, forbids the state legislature from passing any "law granting to any association, corporation, or individual any exclusive rights, privileges or immunities within [Oklahoma]." This provision seeks to ensure that the state legislature "preserve[s] equality between citizens * * * who are similarly situated." *Kimery* v. *Public Serv. Co.*, 622 P.2d 1066, 1071 (Okla. 1980). As the court of appeals correctly reasoned, operation of Section 306(b) of the Act does not offend that constitutional provision where Congress, not the Oklahoma state legislature, effectively has granted the exclusive right to provide water to Eden South. See Pet. App. A23.

Petitioner suggests in passing (Pet. 6) that the state legislature essentially granted that exclusive right by virtue of the state law authorizing water providers to contract with the federal government. See Okla. Stat. tit. 82, § 1324.10.A.4 (Supp. 1989). The Oklahoma Supreme Court, however, has carved out an exemption from the state constitutional bar when the state legislature grants an exclusive right to a state agency performing a public function. See *Public Serv. Co.* v. *Caddo Elec. Coop.*, 479 P.2d 572, 577, 581 (Okla. 1971) (rural electric cooperative); *In*

re Oklahoma Turnpike Auth., 203 Okla. 335, 345, 221 P.2d 795, 807 (1950) (turnpike authority).[8] Accordingly, the court of appeals' treatment of the state constitutional provision's application here is consistent with state law.

2. Petitioner also suggests that this case presents an occasion for the Court to address the "applicability of two water providers both coming under 7 U.S.C. 1926(b) at the same time with both of the water providers seeking to provide service to the same area" (Pet. 9). The record, however, belies this contention. First, the record does not show that petitioner and District No. 2 had FmHA loans outstanding "at the same time" (*ibid.*). On the contrary, petitioner, through the City of Glenpool, repaid its FmHA loan months before the trial began and therefore could no longer claim any rights as a debtor under Section 306(b) of the Act. See Pet. App. A4. Second, the record does not show, as petitioner asserts (Pet. 8-9), that petitioner obtained an FmHA loan and provided water service to Eden South because District No. 2 was unable to meet its service obligation. The district court expressly found that "District No. 2 could and would provide water service to Eden

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[8] But see *Comanche County Rural Water Dist. No. 1* v. *City of Lawton*, 501 P.2d 490, 492-493 (Okla. 1972) (city could sell water outside its limits to consumer within an FmHA-assisted rural water district; court suggests in dictum that state constitution could be an impediment to an exclusive grant under federal law).

At bottom, the court of apppeals' interpretation of the state law question has limited significance. Although not pressed as an independent argument before the court of appeals, see Gov't C.A. Br. 18 n.3, the Supremacy Clause of the federal Constitution would trump any potential impediment raised by the state constitutional provision. Where Congress specifically has intended to protect federally assisted rural water providers under Section 306(b) of the Act, any inconsistent state law provision must yield. See *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

South within a reasonable time following application for same" (Pet. App. A6). Accordingly, this case does not present an issue concerning the application of Section 306(b) to substantially similar competing rural water providers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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